United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 8, 2011

TO : Cornele A. Overstreet, Regional Director
Region 28

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Safeway Inc.
Case 28-CA-22896

The Region submitted this Section 8(a)(1) and (3) case for advice as to whether, under the General Counsel's proposed new standards, it should defer to an arbitral award upholding a Union steward's termination.[1] We conclude that this case would not be an appropriate vehicle to argue for the adoption of the proposed new deferral standards because the arbitral award is not clearly repugnant to the Act, and that the Region should defer to that award.

The Employer and the United Food and Commercial Workers Union, Local 99 (the Union) were parties to a collective-bargaining agreement that was in effect through October 2008. The parties agreed to various extensions of that agreement, the last of which expired on October 30, 2009. After that time, while the agreement was in abeyance, the Union threatened to strike all 120 of the Employer's Arizona stores if no agreement on a successor contract was reached by November 13, 2009. The parties reached a tentative agreement on November 13, 2009, which retroactively covered the period back to October 30, 2009.

This case involves the Employer's suspension and termination of a long-time employee who had been the Union's only shop steward at the store since 1999, for allegedly making threatening statements to four employees on the eve of the deadline for avoiding a strike. Four employees asserted that in separate conversations with the discriminatee on or around November 11, 2009, he threatened them (or made them feel threatened) after they asked him what would happen if they crossed the picket line and/or

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[1] *See* "Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases," GC Memorandum 11-05, dated January 20, 2011.

resigned from the Union.[2] These employees reported the discriminatee's threats to the Employer. The Employer suspended the discriminatee pending an investigation into the complaints and later terminated him for violating its workplace violence policy.

The Union filed a grievance regarding the discriminatee's suspension and termination. The Region deferred the instant Section 8(a)(1) and (3) charge to arbitration pursuant to *Dubo Manufacturing Corporation*.[3] On July 27, 2010, the Arbitrator issued his Opinion and Award, upholding the termination. The Arbitrator considered two issues: (1) whether the discharge was for just cause; and (2) if not, what is the appropriate remedy. The Arbitrator summarized the parties' positions and stated that he had considered each of those positions, including their legal citations. After considering all of the evidence, including witness testimony, the arbitrator determined that the "weight of the credible evidence" is that the discriminatee "let his passion get the better of him and engaged in a course of intimidating and threatening behavior causing at least four fellow employees to complain to management," and that, upon investigation, management believed they reasonably felt threatened and that the threat was immediate within the meaning of the workplace violence policy. The Arbitrator found no evidence that the employees involved conspired among themselves or that any of the witnesses had fabricated or was in error in judging that they were subjected to intimidation and/or threatening behavior. Thus, he concluded that it was not "arbitrary, capricious, discriminatory, or an abuse of judgment" for

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[2] [*FOIA Exemptions 6 and 7(C)*

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[3] 142 NLRB 431 (1963).

the Employer to terminate the discriminatee notwithstanding his many years of service.

Under the General Counsel's proposed new standards for deferral in Section 8(a)(1) and (3) cases, the party urging deferral must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board should defer unless the award is clearly repugnant to the Act.[4]

We conclude that this would not be an appropriate vehicle to urge adoption of the proposed new standards. Here, the contract incorporated the statutory right, and the parties also presented the statutory issue to the arbitrator. But because the Arbitrator did not enunciate the applicable statutory principles, and it is not clear that he even implicitly applied the correct legal standards in determining that the discharge was not discriminatory, deferral is arguably inappropriate here under the proposed new standards. Nevertheless, the Arbitrator's decision is not clearly repugnant and instead is susceptible to an interpretation consistent with the Act.[5]

Accordingly, the Region should defer to the arbitral award and dismiss the instant charge, absent withdrawal.

B.J.K.

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[4] GC Memorandum 11-05 at 6-7.

[5] See *Olin Corp.*, 268 NLRB 573, 574 (1984).